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No. 97-1374

In the Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON, ET AL., APPELLANTS

v.

CITY OF NEW YORK, ET AL.

ROBERT E. RUBIN, APPELLANT

v.

SNAKE RIVER POTATO GROWERS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANTS

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A. The Case Is Non-Justiciable

This case is non-justiciable, since appellees have not shown that they have suffered any concrete injury, or that they are in imminent danger of doing so, as a result of the President's exercise of his cancellation authority. We acknowledge the significant public and governmental interest in obtaining a prompt, dispositive resolution of the Line Item Veto Act's constitutional status. This Court, however, has repeatedly recognized the "overriding and time-honored concern about keeping the Judiciary's power within its proper sphere," *Raines* v. *Byrd*, 117 S. Ct. 2312, 2318 (1997), that is reflected in the "case" or "controversy" requirement of Article III of the Constitution. In the long run, strict adherence to that requirement protects the separation of powers, see, *e.g.*, *Allen* v. *Wright*,

468 U.S. 737, 750 (1984), and conserves the resources of both the Executive and Judicial Branches, by ensuring that litigation in the federal courts is employed "only in the last resort, and as a necessity in the determination of real, earnest and vital controversy," *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892)). The judgment of the district court should therefore be vacated, on the ground that the court lacked jurisdiction to hear the case.[1]

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[1] In our opening brief (at 16-17) we explain that most of the appellees are not "individual[s]" entitled to invoke the judicial review provision of the Line Item Veto Act, 2 U.S.C. 692(a)(1) (Supp. II 1996). That fact does not, however, divest this Court of jurisdiction over this appeal. The Court's appellate jurisdiction under the Act's judicial review provision extends to "any order of the [district court] which is issued pursuant to an action brought under" Section 692(a)(1). 2 U.S.C. 692(b) (Supp. II 1996). The judgment from which the government appealed is clearly such an order. That is so both because all of the appellees "brought" this case (whether properly or not) under Section 692(a)(1), by invoking it as a jurisdictional basis for their suits (and as the *only* basis for laying venue in the District of Columbia), see J.A. 12-13, 22, and because Mike Cranney—one of the *Snake River* appellees— is an "individual" within the meaning of the Act. (To eliminate any possibility that the district court's decision might escape review, however, the government has also filed a notice of appeal to the District of Columbia Circuit.)

Although this Court has jurisdiction over the entire case, Section 692(a)(1)'s limitation to "individual[s]" does affect the proper disposition of the appeal. The Court may consider appellees' constitutional challenges on the merits only if it concludes (with respect to each cancellation) that at least one plaintiff satisfies *both* the constitutional and statutory requirements for invoking the power of the district court. The *Snake River* appellees have made no effort to explain how appellee Cranney has suffered injury in fact. The remaining appellees do not satisfy the statutory prerequisites for obtaining judicial review and therefore would not be proper plaintiffs even if the Court concluded that they meet the requirements of Article III.

1. a. Under Article III, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas* v. *United States*, No. 97-29 (Mar. 31, 1998), slip op. 4 (internal quotation marks omitted). Under that standard, the claims of the *City of New York* appellees are manifestly non-justiciable. As we explain in our opening brief (see Gov't Br. 10, 20), appellees will not suffer any financial injury unless the Secretary of Health and Human Services ultimately denies New York's pending waiver applications. Even then, the prospect of injury is contingent on independent decisions by the State of New York regarding the state tax liability of appellee health care providers. As a result, whether appellees will ever suffer any financial injury depends on "contingent future events that * * * may not occur at all." *Texas*, slip op. 4.

Because the prospect of future financial injury depends on the outcome of unresolved administrative waiver applications, the standing and ripeness issues in this case

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Appellees' invocation of 28 U.S.C. 1331 (see J.A. 12, 22) does not alter that analysis. The citation to Section 1331 appears to have been intended to assure a jurisdictional basis for appellees' suits under 2 U.S.C. 692 (Supp. II 1996), since that provision does not in terms confer jurisdiction on the district courts. Section 1331 does not create a cause of action, much less authorize adjudication of a suit against the government absent an independent waiver of sovereign immunity. *Cf. FDIC* v. *Meyer*, 510 U.S. 471, 475, 483-486 (1994); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37-38 (1992). Appellees have not identified any statutory provision other than Section 692(a)(1) that could plausibly be thought to waive the sovereign immunity of the United States and allow this suit to proceed in its present form. The absence of any "final agency action" would alone preclude appellees from invoking the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 701 *et seq*. Further questions would arise in *City of New York* with respect to whether plaintiffs other than the State itself may sue the Secretary under the Medicaid program, and the *Snake River* appellees could not circumvent the statutory procedures for litigation of tax issues.

closely resemble those in *Anderson* v. *Green*, 513 U.S. 557 (1995) (per curiam). See Gov't Br. 20-21. Appellees seek to distinguish *Anderson* on the ground that the plaintiffs there faced injury if the waiver application were granted, while appellees face injury if the waiver application is denied. City of N.Y. Br. 22-23. That, however, is a distinction without a difference. What made the claims in *Anderson* non-justiciable was the contingent nature and uncertain outcome of the waiver process (see 513 U.S. at 559), and the waiver process here is equally contingent and uncertain.

Appellees insist that New York's waiver applications "will almost certainly be denied." City of N.Y. Br. 19. Nothing in the record, however, supports that bald assertion. Contrary to appellees' claim (*id.* at 22), HHS has not "tipped its hand regarding the waiver applications."[2] And as we explain in our opening brief (at 22-23 n.9), when the President certified that the cancellation of Section 4722(c) of the Balanced Budget Act of 1997 would reduce the budget deficit, he was describing the effect of the cancellation on existing budget authority, not foretelling the outcome of the administrative waiver process.

b. Appellees also argue that the President's cancellation of Section 4722(c) caused them an immediate injury by "reinstating the potential, large or small, of HHS disapproval" of New York's waiver applications. City of N.Y. Br. 14. Appellees assert that "no matter what the likelihood that HHS might ultimately grant New York waivers," the mere change "from being protected against loss

[2] Appellees point (City of N.Y. Br. 20 n.7) to alleged statements by HHS officials that "there would be no resolution of New York's waivers absent resolution of waivers for all states." See J.A. 106. Saying that New York's waiver applications will not be "resolved" without a global resolution is, of course, very different from saying that the waiver applications will be denied.

to being once again exposed" constitutes a cognizable injury for Article III purposes. *Id.* at 15, 18.

That argument treats the bare risk of future injury, "no matter what [its] likelihood" (City of N.Y. Br. 15), as sufficient to support the exercise of jurisdiction under Article III. This Court's precedents, however, are directly to the contrary. They require that the risk of future injury be significant and imminent before federal courts will undertake the task of adjudicating the constitutionality of government actions. See, *e.g.*, *Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983) ("[The] threat of injury must be both real and immediate, not conjectural or hypothetical.") (internal quotation marks omitted); *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 298 (1979) (plaintiff "must demonstrate a realistic danger of sustaining a direct injury"); *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89-90 (1947) ("[a] hypothetical threat is not enough"). The Court's insistence on a "real and immediate" risk of injury cannot be evaded by characterizing the absence of an absolute protection from future harm as a judicially cognizable injury.[3]

c. Appellees also contend that being forced to proceed before an improper "forum" (here, the HHS waiver process) constitutes a cognizable injury for Article III purposes, even if the forum might ultimately provide the desired relief. City of N.Y. Br. 15-16. That argument is without merit. Any burden or expense that might be associated with the administrative process will be borne by the State of New York, compare *Thomas* v. *Union*

[3] In *Anderson* v. *Green* (see pp. 3-4, *supra*), it could equally well have been said that affirmance of the lower court's decision striking down the challenged statutory provision would have eliminated any risk that the provision would ultimately injure the plaintiffs. The Court nevertheless found the case to be non-justiciable in light of the existing uncertainty regarding the outcome of the HHS waiver process. See 513 U.S. at 559.

Carbide Agricultural Products Co., 473 U.S. 568, 581 (1985) (plaintiff's challenge to the constitutionality of a statute calling for binding arbitration held ripe for review where the plaintiff already "ha[d] engaged in an arbitration lasting many months and consuming 2,700 pages of transcript"), and any entitlement that Section 4722(c) might be thought to have created likewise rests with the State.[4] Appellees cannot claim to be injured by compelled participation in a "forum" to which they are not parties.

Thus, any cognizable injury that might be caused by prolonging the HHS waiver process will be imposed not upon appellees, but upon the State of New York. And as we explain in our opening brief (at 23-25), any financial harm that appellees may ultimately suffer as a result of the challenged cancellation would be purely derivative of the State's loss of federal Medicaid funding. The record in this case does not reveal why the State has declined to file suit. It may be that state officials believe that the administrative process will yield a favorable result, and that they prefer to work within that process and obtain a final agency decision before turning to the courts. It is also possible that New York's political leaders—like the Congress that passed the Line Item Veto Act and the President who signed it—believe the Act to be constitutional. Whatever the reasons for the State's forbearance, however, appellees should not be permitted to demand judicial resolution of a claim that the State itself has declined to

[4] Appellees therefore err in invoking the proposition that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." City of N.Y. Br. 15 (quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973)). Even assuming *arguendo* that Section 4722(c) created "legal rights" whose "invasion" by the President's cancellation "create[d] standing," those rights belong to the State of New York, not to appellees.

pursue—particularly in the absence of any showing that appellees have suffered harm.

2. The claims of the *Snake River* appellees are likewise non-justiciable. As we explain in our opening brief (at 26-32), appellees have not shown either that the cancellation of Section 968 of the Taxpayer Relief Act of 1997 has prevented them from consummating any qualifying transaction that would otherwise have taken place, or that the cancellation has altered the terms of any such transaction.

a. As an initial matter, appellees state that Congress intended for Section 968 to benefit farmers' cooperatives. Snake River Br. 20-21. We have no quarrel with that assertion. But the fact that Section 968 was intended to benefit a *class* of farmers' cooperatives is hardly sufficient to show that Section 968 would have benefitted appellees in particular. See *Warth* v. *Seldin*, 422 U.S. 490, 502 (1975) ("Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong."); *Valley Forge*, 454 U.S. at 489 ("[t]he law of averages is not a substitute for standing").

b. Appellees assert that they were taking "concrete and specific steps" toward purchasing the IPP processing facility and that the President's cancellation of Section 968 "thwarted the[ir] plans." Snake River Br. 23. They do not allege, however, that as a result of the cancellation IPP terminated the negotiations, increased its asking price, or otherwise insisted on terms less favorable to appellees. Instead, appellees themselves unilaterally discontinued the negotiations, without (as far as the record indicates) even inquiring about IPP's willingness to pursue the proposed transaction. See J.A. 114. It therefore remains purely speculative whether the cancellation actually prevented the transaction from proceeding. That kind

of speculation is often characteristic of cases in which "the plaintiff is not himself the object of the government action or inaction he challenges," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992), and is inadequate to establish the requisite causal nexus between the President's actions and appellees' asserted injuries.

c. Alternatively, appellees assert that "a plaintiff who is actively pursuing a prospective acquisition of property, or actively negotiating a prospective contract, has standing to challenge government action that concretely and adversely affects the process of pursuit." Snake River Br. 22. None of the cases cited by appellees, however, supports that proposition. Most of the cases involve challenges to government actions that burdened *existing* contractual relationships, not hypothetical "prospective" ones. See *Bennett* v. *Spear*, 117 S. Ct. 1154, 1159 (1997); *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 950 (1984); *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 256-257, 261 (1977). The Court's decision in *Northeastern Florida Chapter of Associated General Contractors of America* v. *City of Jacksonville*, 508 U.S. 656 (1993), is inapposite because, as we explain in our opening brief (at 33), its "equal footing" analysis was explicitly predicated on the underlying presence of an equal protection claim. And in *Bryant* v. *Yellen*, 447 U.S. 352 (1980), the federal laws in question effectively ensured that "excess" property would be sold, and at below-market prices. See Gov't Br. 30 n.14. Here, by contrast, there is no assurance that any "qualified refiner or processor" would sell its stock to putative buyers such as appellees, much less that it would share with them the tax benefits conferred on it by Section 968.

B. The Line Item Veto Act Is Constitutional

If this Court concludes that appellees' claims are justiciable, the judgment of the district court should be reversed. The President's cancellation of the budgetary items at issue in this case was a legitimate exercise of executive power, not an impermissible exercise of legislative authority.

1. In our opening brief (at 33-35), we explain that the Line Item Veto Act does not conflict with the procedural requirements of the Presentment Clause because the Act does not come into play until after those requirements have been satisfied. When the President is presented with a spending or tax bill, he must "sign" or "return" (Art. I, § 7, Cl. 2) it in its entirety. When he signs the bill, it becomes a law, and the "finely wrought" lawmaking procedures of the Presentment Clause (*INS* v. *Chadha*, 462 U.S. 919, 951 (1983)) are complete. The President's cancellation of individual items after a tax or spending bill has been signed into law represents an exercise of the Article II power to execute the laws, not a partial "return" of a presented bill.

Appellees appear to acknowledge that cancellation under the Act complies with the literal terms of the Presentment Clause. They contend, however, that the Act operates "to defeat the very purpose of" Article I's procedural requirements (City of N.Y. Br. 30), and that it represents "a forbidden 'indirect attempt to accomplish what the Constitution prohibits accomplishing directly'" (Snake River Br. 35) (brackets and ellipsis omitted) (quoting *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 829 (1995)). Those arguments reflect a fundamental misunderstanding of the purpose of Article I's *in toto* requirement.

The Presentment Clause establishes precise and detailed procedural requirements governing the presentment by Congress and approval by the President of any "Bill." Art. I, § 7, Cl. 2. The Framers imposed no restrictions, however, on the number or variety of provisions that a single "Bill" may contain. While a narrow, discrete

provision (*e.g.*, Section 4722(c) of the Balanced Budget Act, or Section 968 of the Taxpayer Relief Act) could be passed by Congress and approved by the President as a separate bill, Congress's typical practice in recent years has been to combine numerous and disparate spending or tax items into a single bill, to be approved or returned by the President in its entirety. See Gov't Br. 35.

When Congress chooses to pass bills of that character, the effect of the *in toto* requirement is to compel the President to make an all-or-nothing choice regarding a broad and multifarious legislative package, even though he might prefer to accept some items and reject others. See Gov't Br. 35. Appellees are mistaken, however, in suggesting that the *purpose* of the *in toto* requirement is to compel the President to make such choices. Nothing in the Presentment Clause reflects a constitutional preference that individual bills should be broad or multifarious rather than narrow or discrete. Rather, the *in toto* requirement serves to ensure that *Congress* retains ultimate authority to define the range of choices available to the President. Congress may (by passing complicated "omnibus" bills) restrict the President to a single all-or-nothing choice on a large package of items; but it may also (by voting on and passing individual items separately) choose to increase the President's flexibility to accept some items and reject others. Because the *in toto* requirement serves only to protect *Congress's* ability to define the range of options available to the President, and embodies no rule or preference as to what that range should be, a decision by Congress itself to increase the President's flexibility cannot reasonably be said "to defeat the very purpose" (City of N.Y. Br. 30) of the Presentment Clause's requirements.

For basically the same reasons, there is no merit to the *Snake River* appellees' contention (at 35) that the Line

Item Veto Act represents an "indirect" attempt to accomplish what could not be done "directly." Stripped to its essentials, appellees' complaint is that the Line Item Veto Act permitted the President to make an up-or-down choice with respect to Section 968 of the Taxpayer Relief Act, unconstrained by his preferences regarding other items contained within that Act. Congress could have accomplished the same result "directly," however, simply by voting on and passing Section 968 as a separate bill, which the President could "sign" or "return."[5] Given the logistical impracticality of conducting a separate vote on every tax and spending item, Congress sought to fashion a different mechanism for increasing the President's role in the budget process. In so doing, Congress was of course obligated to comply scrupulously with the procedural requirements of Article I. But there is no basis for appellees' view that the Act should be regarded with suspicion on the theory that it was designed to accomplish an illicit end.

2. Appellees' principal theory is that the Act improperly authorizes the President to effect a unilateral amendment or repeal of provisions of an enacted law. Thus, the *City of New York* appellees state (at 32-33):

> In passing section 4722(c), Congress made a decision that New York State's health-care taxes qualify for federal matching funds. That decision became law when the President signed the Balanced Budget Act. The President disagreed with Congress' judgment and thus reversed its determination by exercising his power of cancellation.

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[5] Indeed, the President's discretion with respect to Section 968 of the Taxpayer Relief Act was more constrained than would have been the case if that Section had been passed as a separate bill, since the President was required to make specific findings as a predicate to his exercise of cancellation authority under the Line Item Veto Act. See Gov't Br. 8, 46.

The *Snake River* appellees likewise contend (at 37) that the Act's "basic defect" is that "Congress is *never* given the opportunity to vote on the truncated law that resulted from the President's cancellation." They attempt (at 48) to distinguish the President's cancellation power from grants of discretionary authority previously approved by this Court on the ground that prior grants of power "d[id] not permit the delegate to overrule or cancel what Congress has specifically prescribed."

As we explain in our opening brief (at 38-40), those arguments cannot be reconciled with the fundamental principle that Congress is presumed to legislate with an awareness of existing law. Congress might have provided that Section 4722(c) of the Balanced Budget Act, or Section 968 of the Taxpayer Relief Act, would not be subject to the President's cancellation authority. See *Raines*, 117 S. Ct. at 2320 (Congress may "exempt a given appropriations bill (or a given provision in an appropriations bill) from the [Line Item Veto] Act"). Its failure to do so must be construed to reflect congressional intent that the President be permitted *either* to implement *or* to cancel the spending and tax items contained within those provisions.[6] In cancelling those items, the President did not "disagree[] with Congress' judgment and thus reverse[] its determination" (City of N.Y. Br. 33), nor did he "overrule or cancel what Congress ha[d] specifically prescribed" (Snake River Br. 48). He simply exercised one of the options conferred on him by Congress itself.

The fact (see Snake River Br. 37) that Congress did not vote on the President's cancellations is legally irrelevant. Congress may, for a variety of legitimate reasons, vest

[6] As we observe in our opening brief (at 39 n.24), that intent is particularly apparent with respect to Section 968 of the Taxpayer Relief Act, which was expressly identified in the Act itself as a "limited tax benefit[] subject to line item veto." § 1701, 111 Stat. 1099, 1101.

Executive Branch officials with discretion in their administration of federal law. Congress may (as here) confer that discretion explicitly. It may also do so implicitly, by employing statutory language that is insufficiently specific to resolve a particular dispute. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984); *Smiley* v. *Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1733 (1996). When Executive Branch officials exercise discretion within a range of authority conferred by statute, Congress need not conduct a second vote to approve the precise manner in which that discretion has been exercised. Indeed, to require Congress to express its approval at that level of specificity would defeat the purposes of conferring discretionary authority. So long as the cancellations at issue in this case fell within the scope of the President's authority under the relevant statutes—and it is undisputed that they did—the fact that Congress did not vote to approve those cancellations presents no Article I problem. See Gov't Br. 37-38 & n.23.[7]

[7] The *Snake River* appellees' reliance (at 40) on *INS* v. *Chadha*, 462 U.S. 919, 952 (1983), is particularly misplaced. The passage on which appellees rely states that a House of *Congress* must enact legislation in accordance with Article I in order to "alter[] the legal rights, duties, and relations of persons * * * outside the Legislative Branch." *Ibid.* The Court did not suggest that the same requirement applies to the exercise by Executive Branch officials of discretionary authority conferred by statute. To the contrary, the *Chadha* Court recognized that "[e]xecutive action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require." *Id.* at 953 n.16.

There is likewise no merit to the *City of New York* appellees' contention (at 33) that because "Article I would prohibit a statute reserving to Congress a unilateral cancellation power identical to that conferred upon the President under the Act," the authority conferred upon the President must be unconstitutional as well. The invalidity of appellees' hypothetical statute results from the fact that "it is to the

Appellees also argue (City of N.Y. Br. 40-41; Snake River Br. 41) that cancellation under the Line Item Veto Act is properly regarded as legislative in nature because the cancellation of a tax or spending item—like an Act of Congress—is irrevocable by the President and can be overridden only by Congress itself. As we explain in our opening brief (at 41), however, the discretion conferred on the President by the Line Item Veto Act is plainly *narrower* than would be the case if the President were authorized to revoke a cancellation after it had been made. Nothing in logic or in this Court's decisions supports the view that Congress is forbidden to condition a grant of discretionary authority to the President on the requirement that it be exercised (or not) within a limited period of time, or that it be irrevocable once undertaken.[8]

President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam) (quoting U.S. Const. Art. II, § 3); see also *Bowsher* v. *Synar*, 478 U.S. 714, 733 (1986) ("once Congress makes its choice in enacting legislation, its participation ends"). The fact that cancellation authority could not constitutionally be vested in Congress hardly undermines our contention that cancellation of budget items pursuant to authority provided by Congress represents the exercise of executive power.

[8] As the *Snake River* appellees point out (at 44), Congress sometimes confers discretion upon Executive Branch officials in order to facilitate the development of federal policy in light of changing circumstances. If that were the *only* legitimate basis on which Executive Branch officials could be permitted to exercise significant discretion, there might be force to the argument that the irrevocable nature of the President's cancellation authority renders it problematic. This Court has recognized, however, that Congress may vest discretion in the Executive Branch for a variety of reasons, some of which have nothing to do with the possibility that relevant conditions will change over time. See, *e.g.*, *Chevron*, 467 U.S. at 865 (Executive Branch officials may appropriately be vested with "policymaking responsibilities" where "Congress [i]s unable to forge a coalition on either side of the question, and those on each side decide[] to take their chances with the agency").

At bottom, appellees' argument reduces to the proposition that federal government action is necessarily legislative in character if it resembles action that Congress itself might take. "This Court established long ago," however, "that Congress must be permitted to delegate to others at least some authority that it could exercise itself." *Loving* v. *United States*, 116 S. Ct. 1737, 1744 (1996). Thus, while the definition of federal criminal offenses is typically performed by Congress, the Court has "upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal." *Id.* at 1748. The Court in *Loving* held that Congress had permissibly vested in the President the authority to promulgate rules for the imposition of capital punishment within the armed forces, see *id.* at 1748-1749—a task obviously similar to the function performed by Congress with respect to civilian offenders, compare 18 U.S.C. 3591-3598. See also, *e.g.*, *Chadha*, 462 U.S. at 953 n.16 ("some administrative agency action—rulemaking, for example—may resemble 'lawmaking'"). So long as the Line Item Veto Act satisfies the standards applicable to statutory grants of power to the Executive Branch, the fact that a presidential cancellation may share one of the attributes of legislative action provides no basis for invalidating the Act.

The *Snake River* appellees also suggest that the Line Item Veto Act need not be tested against the standards governing grants of discretionary administrative authority because Congress did not actually conceive of the President's cancellation power in those terms. See Br. 40 ("the Act's title and its mimicry of the veto power * * * surely show that what Congress thought it was doing was giving the President a unilateral power to shape the law

itself, not merely to implement it"). This will not do.[9] "When any Branch [of the federal government] acts, it is presumptively exercising the power the Constitution has delegated to it. When the Executive acts, he presumptively acts in an executive or administrative capacity as defined in Art. II." *Chadha*, 462 U.S. at 951 (citation omitted). And "[w]hen the President acts pursuant to an express or implied authorization from Congress," his actions are "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981) (internal quotation marks omitted). If the Line Item Veto Act satisfies the substantive standards applicable to legislative grants of discretionary administrative authority, appellees' speculation that Congress misunderstood the constitutional basis for the Act provides no ground for holding the Act invalid.[10]

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[9] The respect due a coordinate Branch is a sufficient basis for rejecting appellees' unsupported assertion that Congress set out to confer legislative authority upon the President. We note as well, however, that appellees' contention is belied by the Act's legislative history. The Conference Report states:

> The conferees note that while the conference report delegates new powers to the President, these powers are narrowly defined and provided within specific limits. The conference report includes specific definitions, carefully delineates the President's cancellation authority, and provides specific limits on this cancellation authority. The delegation of this cancellation authority is not separable from the President's duties to comply with these restrictions.

H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. 19 (1996).

[10] Appellees also suggest (City of N.Y. Br. 38-39 n.26; Snake River Br. 45) that cancellation under the Line Item Veto Act cannot truly be an exercise of executive power because it is not subject to any judicial check. In our view, a court may determine whether a cancelled budgetary item is properly subject to cancellation under the Act—*i.e.*, whether it falls within the statutory definition of "dollar amount of discretionary budget authority," "item of new direct spending," or "limited tax benefit." 2 U.S.C. 691(a) (Supp. II 1996). That form of judicial review adequately ensures that the President's "administrative activity cannot reach beyond the limits of the statute that created it." *Chadha*, 462 U.S. at 953 n.16; cf. note 9, *supra*.

We do not believe that the findings contained in the President's special message (see Gov't Br. 8) are open to judicial reexamination. The absence of such review, however, is scarcely anomalous. To the contrary, executive determinations required to be made by the President personally are presumptively not subject to review for reasonableness. See *Franklin* v. *Massachusetts*, 505 U.S. 788, 801 (1992) ("We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion."). As we noted in our opening brief (at 45-46), moreover, a subordinate Executive Branch official's allocation of funds from a lump-sum appropriation has traditionally been regarded as "committed to agency discretion" and therefore not subject to judicial review. See *Lincoln* v. *Vigil*, 508 U.S. 182, 191-192 (1993).

3. Finally, appellees contend (Snake River Br. 45-48; City of N.Y. Br. 37-39) that the Act fails to place constitutionally sufficient constraints on the President's discretion, and that it is therefore invalid even under the standards applicable to statutory grants of administrative authority. That argument is without merit.

a. The legislative practice of giving the President substantial discretion over the expenditure of appropriated funds has a 200-year pedigree. See Gov't Br. 2-5; Senate Amicus Br. 3-11.[11] On those occasions when Congress has tightened controls on Executive Branch discretion, it has

[11] The Line Item Veto Act requires that the President's special message announcing a cancellation must "specify," *inter alia*, "all facts, circumstances and considerations relating to or bearing upon the cancellation, and to the maximum extent practicable, the estimated effect of the cancellation upon the objects, purposes and programs for which the cancellation authority was provided." 2 U.S.C. 691a(b)(1)(E) (Supp. II 1996). As that language suggests, projects for which federal funds are appropriated typically do not exist in a vacuum. They are instead intended to serve the purposes of some larger government program—a program that will, in the nature of things, be administered by Executive Branch officials. The President's determination that a particular spending item is suitable for cancellation may be informed by his understanding of the larger programmatic context and by the specialized expertise of subordinate Executive Branch officials.

typically aimed at preventing overspending, not underspending. See, *e.g.*, Act of July 12, 1870, ch. 251, § 7, 16 Stat. 251 (Anti-Deficiency Act) (codified as amended at 31 U.S.C. 1341).[12] The Line Item Veto Act places far greater constraints on the President's discretion than did the lump-sum appropriations bills favored by early Congresses. See Gov't Br. 3; *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 322 (1937) (constitutionality of lump-sum appropriations "has never been seriously questioned"). In light of Congress's repeated (and heretofore unquestioned) practice of vesting executive officials with substantial authority over the expenditure of federal funds, the Act's provisions governing the cancellation of spending items cannot be said to effect an impermissible shift in the balance of power between the Legislative and Executive Branches.[13]

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[12] The Constitution itself reflects a concern with restraining, rather than compelling, expenditures by the Executive Branch. The Appropriations Clause (Art. I, § 9, Cl. 7) prohibits the drawing of money from the Treasury except "in Consequence of Appropriations made by Law." See generally *OPM* v. *Richmond*, 496 U.S. 414 (1990). That Clause was designed in part to ensure that the Executive Branch spends no more than Congress appropriates. See *id.* at 427; *Reeside* v. *Walker*, 52 U.S. (11 How.) 271, 291 (1851). The Constitution contains no comparable provision aimed at compelling the expenditure of appropriated funds.

[13] The *City of New York* appellees assert, without explanation, that "cancellation of section 4722(c), which established as a matter of law that the disputed federal matching funds belong to New York, is precisely analogous to cancellation of a limited tax benefit, rather than an item of spending authority." City of N.Y. Br. 44. We see no basis for that assertion. By authorizing the President to cancel items of new direct spending, the Line Item Veto Act simply confers discretion over the manner in which the government's own funds will be spent. Insofar as the cancellation of discretionary budget authority (*i.e.*, appropriations) and limited tax benefits may be thought to raise distinct constitutional issues, items of new direct spending are much more closely analogous to the former.

b. The *Snake River* appellees contend (at 41 n.36) that the cancellation of Section 968 raises distinct constitutional concerns because it "has no arguable historical analog." As we explain in our opening brief, however, Congress has frequently vested the President with discretionary authority over the imposition of taxes. Gov't Br. 48; see Senate Amicus Br. 6-7; *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 221-222 (1989) (discussing historical practice). The Court has squarely held that "the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that [the Court] ha[s] applied to other nondelegation challenges." *Id.* at 223. The Act's provisions governing limited tax benefits are therefore subject to the same "intelligible principle" standard (see Gov't Br. 45) that applies to other grants of discretionary administrative authority.

Applying the "intelligible principle" standard, this Court has repeatedly approved grants of discretionary authority "under [statutory] standards phrased in sweeping terms." *Loving*, 116 S. Ct. at 1750; see Gov't Br. 45. Appellees do not contend that the statutory provisions previously upheld by this Court—*e.g.*, the authorization for the Federal

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If the Court disagrees, however, and if it concludes that the Act's provisions concerning direct spending and tax benefits are invalid under the nondelegation doctrine, the Court need not and should not decide whether the provisions governing discretionary budget authority survive. That question is not presented by this case, since none of the appellees claim to have been injured by the cancellation of discretionary budget authority. See *Printz* v. *United States*, 117 S. Ct. 2365, 2384 (1997) (Court declined to decide issue of severability where plaintiffs had no concrete interest in its resolution). The government's view, however, is that the Act's provisions governing cancellation of discretionary budget authority would be "fully operative as a law," *Buckley*, 424 U.S. at 108, and would therefore remain intact even if the rest of the Act were struck down as an overly broad conferral of administrative authority. See Gov't Br. 48 n.28.

Communications Commission to regulate broadcast licensing as required by the "public interest, convenience, or necessity," *NBC* v. *United States*, 319 U.S. 190, 194, 225-226 (1943)—imposed greater constraints on Executive Branch discretion than does the Line Item Veto Act.[14] Rather, they seek to distinguish those cases on the ground that the statutes at issue "d[id] not permit the delegate to overrule or to cancel what Congress ha[d] specifically prescribed." Snake River Br. 48. That argument is simply a reprise of appellees' contention that cancellation under the Act effects an impermissible repeal of an enacted law; it should be rejected for the reasons stated at pp. 11-16, *supra*.

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For the reasons stated above and in our opening brief, the judgment of the district court should be vacated and the case remanded with instructions to dismiss for lack of jurisdiction. Alternatively, the judgment of the district court should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

APRIL 1998

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[14] As we explain above, moreover, see pp. 10-11 & note 5, *supra*, the President's authority to cancel limited tax benefits is more constrained than the discretion that he would possess if Congress adopted the (unquestionably constitutional) practice of enacting individual tax provisions as separate bills.